

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-33472

GARRY EUGENE LOVEDAY

Debtor

**MEMORANDUM ON CHAPTER 13 TRUSTEE'S
MOTION TO BAR DEBTOR FROM REFILING**

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This matter is before the court on the Motion to Bar Debtor from Refiling Bankruptcy for 180 Days (Motion to Bar) filed by the Chapter 13 Trustee (Trustee) on October 15, 2002, requesting that the court dismiss the Debtor's case "with prejudice." The "prejudice" sought by the Trustee is to bar the Debtor from filing another bankruptcy petition for 180 days.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O). (West 1993).

I

The Debtor filed the Voluntary Petition commencing this Chapter 13 case on July 2, 2002. Within an eleven-month period prior to the filing of the present case, the Debtor has also filed the following bankruptcy cases: (1) a Chapter 7 case filed September 13, 2001, from which the Debtor received a discharge on January 10, 2002; and (2) a Chapter 13 case filed April 4, 2002, which was dismissed June 5, 2002, upon the Trustee's certification that no plan payment was made within 30 days of the commencement of the case as required by E.D. TENN. LBR 2015-5.

In this case, on October 8, 2002, the Debtor, exercising the absolute right to dismiss afforded him by 11 U.S.C.A. § 1307(b) (West 1993), filed a Motion to Dismiss Chapter 13 Case (Motion to Dismiss). The Motion to Dismiss was filed on the eve of a hearing on confirmation of the Debtor's Chapter 13 Plan and on objections to confirmation filed by the Trustee, Midland Mortgage Company, the holder of a lien encumbering the Debtor's residence, and by Victoria Loveday, the Debtor's former spouse. Pursuant to the Debtor's Motion to Dismiss, the court entered an Order Dismissing Case on October 9, 2002. On October 15, 2002, the Trustee filed

her Motion to Bar, based upon the Debtor's lack of good faith in filing this bankruptcy case.¹ The court, treating the Trustee's Motion to Bar as a motion to alter or amend filed pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, made applicable to this contested matter by Rule 9023 of the Federal Rules of Bankruptcy Procedure, held a hearing on the Motion to Bar on November 6, 2002.²

The Trustee maintains that the Debtor filed the present bankruptcy case in bad faith. She asserts that his schedules are intentionally misleading, designed so that the Debtor's financial dealings and operations are not disclosed in order to avoid the repayment of \$213,000.00 in nondischargeable debts from his 2001 Chapter 7 bankruptcy. The Debtor maintains that he was required to dismiss this Chapter 13 bankruptcy case because his material circumstances have changed such that he can not adequately fund his proposed Chapter 13 Plan. The court makes no finding on the Trustee's and Debtor's representations.³

¹ A similar motion, entitled "Motion to Bar Debtor From Refiling Bankruptcy for 180 Days," was filed by Midland Mortgage Company on October 8, 2002. This motion, grounded in part on Midland Mortgage Company's assertion that it had been prevented from foreclosing its lien encumbering the Debtor's residence on the three occasions precipitated by the Debtor's bankruptcy filings, was not reviewed by the court until after the October 9, 2002 Order Dismissing Case had been entered and was summarily denied on October 11, 2002. Upon subsequent consideration of the Chapter 13 Trustee's Motion to Bar and after hearing oral argument on November 6, 2002, including argument of Midland Mortgage Company's counsel, the court determined that it would reconsider its dismissal of the present case. As this can be done within the confines of the Chapter 13 Trustee's Motion to Bar, the court finds it unnecessary to reconsider its October 11, 2002 Order denying Midland Mortgage Company's dismissal motion.

² At this hearing, the court considered oral argument of counsel, but did not conduct an evidentiary hearing. The record before the court consists of all matters of record in the present case and in the Debtor's two prior cases. See FED. R. OF EVID. 201.

³ See *supra* n.1.

The issue before the court is whether to amend the October 9, 2002 Order Dismissing Case to impose a bar upon the Debtor, prohibiting him from refiling a fourth bankruptcy case for 180 days.

II

An overarching purpose of the Bankruptcy Code is to relieve the honest but unfortunate debtor of his indebtedness so that he may make a fresh start. *In re Krohn*, 886 F.2d 123, 125 (6th Cir. 1989) (citing *Local Loan Co. v. Hunt*, 54 S.Ct. 695, 699 (1934)). However, a debtor is required to file and proceed in his bankruptcy case in good faith. *See In re Pike*, 258 B.R. 876, 880-81 (Bankr. S.D. Ohio 2001); *In re McCoy*, 237 B.R. 419, 422 (Bankr. S.D. Ohio 1999). It is the duty of the bankruptcy court to uphold the provisions of the Bankruptcy Code. *See* 11 U.S.C.A. § 105. Section 105(a) of the Bankruptcy Code defines the power of the court as follows:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C.A. § 105(a). (West 1993). “The basic purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction. . . . Bankruptcy courts, both through their inherent powers as courts, and through the general grant of power in section 105, are able to police their dockets and afford appropriate relief.” *Casse v. Key Bank Nat’l Ass’n (In re Casse)*, 198 F.3d 327, 336 (2d Cir.

1999) (quoting 2 COLLIER ON BANKRUPTCY ¶ 105-5 to -7 (Lawrence P. King ed., 15th ed. 1999)).

This power under § 105(a) includes the authority of the court to dismiss a case with prejudice. See *McCoy*, 237 B.R. at 422; *In re Spear*, 203 B.R. 349, 354 (Bankr. D. Mass. 1996).

Multiple filings by a debtor are not, in and of themselves, improper. *Pike*, 258 B.R. at 881 (citing *Johnson v. Home State Bank*, 111 S.Ct. 2150 (1991), and *Soc’y Nat’l Bank v. Barrett (In re Barrett)*, 964 F.2d 588, 591 (6th Cir. 1992)). However, a history of multiple filings and dismissals can be construed as bad faith. See *Pike*, 258 B.R. at 881; *McCoy*, 237 B.R. at 422. When a debtor has flagrantly misused the bankruptcy process, the court may impose a bar on the ability of the debtor to re-file within a specific time period. See *McCoy*, 237 B.R. at 422. “In order to prevent abuse of the bankruptcy process by bad-faith filings, courts have the authority to dismiss bankruptcy cases, [and] enjoin future filings . . . under sections 105(a) and 109(g)(1)” *Id.* The court may utilize this remedy on its own or in response to the Debtor’s Motion to Dismiss pursuant to § 1307(b). See *In re Dilley*, 125 B.R. 189, 195 (Bankr. N.D. Ohio 1991).

III

Here, the court finds that the Debtor’s three bankruptcy filings within an eleven-month period constitutes an abuse of the bankruptcy process. Individually taken, the court does not take issue with the Debtor obtaining a discharge under Chapter 7 on January 10, 2002, nor does the court take issue with his filing of a Chapter 13 case in April 2002, and again in July 2002 after the first Chapter 13 case was dismissed for failure to make payments to the Trustee. However, when taken together, along with the Debtor’s Motion to Dismiss filed on the eve of the confirmation

hearing, and the three separate objections to confirmation filed by the Trustee, Midland Mortgage Company, and Victoria Loveday, the evidence weighs heavily against the Debtor filing in good faith. Accordingly, the court will amend the October 9, 2002 Order Dismissing Case to include a provision barring the Debtor from filing a future petition under title 11 of the United States Code for a period of ninety (90) days from the date of the amended order dismissing case.⁴

An order granting the Chapter 13 Trustee's Motion to Bar will be entered. A separate order amending the October 9, 2002 Order Dismissing Case will also be entered.

FILED: November 13, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

⁴ The court does not choose to bar the Debtor from refiling for the 180 days requested by the Chapter 13 Trustee.

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ORDER

For the reasons stated in the Memorandum on Chapter 13 Trustee's Motion to Bar Debtor From Refiling filed this date, the court directs that the Motion to Bar Debtor From Refiling Bankruptcy for 180 Days filed by the Chapter 13 Trustee, Gwendolyn M. Kerney, on October 15, 2002, is GRANTED. A separate order amending the October 9, 2002 Order Dismissing Case will be entered with bar language.

SO ORDERED.

ENTER: November 13, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE